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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THELMA WALKER, Plaintiff and Respondent, v. SAN FRANCISCO HOUSING AUTHORITY, Defendant and Appellant.	A095476 (San Francisco County Super. Ct. No. 998090)

In the face of flagrant discovery abuse, the trial court ordered terminating sanctions against appellant San Francisco Housing Authority (SFHA). After entry of default judgment against it, SFHA submitted an affidavit of attorney fault, moving unsuccessfully to set aside the default judgment pursuant to Code of Civil Procedure[1] section 473, subdivision (b) (section 473(b)). On appeal, SFHA assails both the order for terminating sanctions and the denial of its motion to set aside the default judgment. We affirm.

I. FACTUAL BACKGROUND

A. *The Underlying Lawsuit*

In September 1998 respondent Thelma Walker filed a complaint against SFHA and Joe Trigueros, a former employee of SFHA. The complaint set forth causes of action for sexual harassment and sex discrimination; defamation; invasion

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts II.A. through II.C. and II.E.

1 All statutory references are to the Code of Civil Procedure.

of privacy; interference with prospective economic advantage; negligent hiring, retention and supervision; assault; and trespass to property.

Walker alleged that while employed by SFHA as a journeyman painter, she suffered "severe and/or pervasive" sexual harassment by her foreman, Joe Trigueros. SFHA eventually put Trigueros on administrative leave, but brought him back before concluding its investigation; several months later he was laid off. Meanwhile, SFHA employees retaliated against Walker. She sought a transfer to another department. Management agreed to the accommodation, reneged, gave her an unacceptable assignment, then assigned Walker to another site where her new supervisor warned other workers to "watch out" for her because she had complained.

B. *Discovery*

1. *Prior to March 2000 Hearing on Motion to Compel*

Walker brought her first motion for sanctions against SFHA for discovery abuse in March 1999. The court awarded $2,500 in sanctions against SFHA and Dennis Caines, the attorney with SFHA's Office of the General Counsel with primary responsibility for the case.

Walker brought a second motion for sanctions in May 1999, along with a motion to compel production of documents. Caines signed a stipulation agreeing to produce everything Walker sought. Toward the end of the year, the parties attempted to meet and confer regarding deficiencies in SFHA's responses to her discovery requests.

Not making headway, on January 20, 2000,[2] Walker moved again to compel discovery, with a third request for sanctions.

2. *Ruling on Motion to Compel*

Following an extensive hearing before Commissioner Loretta M. Norris, the court ordered that SFHA comply with 31 of Walker's discovery requests within three

[2] Unless otherwise indicated, all further references to dates are in the 2000 calendar year.

weeks. Among other things, the court called for (1) "clear, straightforward" declarations on significant enumerated points concerning SFHA's investigation and actions it took as a result of Trigueros's conduct toward Walker; (2) sworn statements that no additional documents existed relating to Walker's return to work, reasons for her assignment, and proposed layoffs of other painters; (3) a response to the special interrogatory requiring SFHA to state all facts supporting its contention that Walker was not sexually harassed by Trigueros; (4) production of documents including complaints of sexual harassment within various departments, Walker's time sheets and layoff forms regarding other employees; and (5) production of certain documents previously ordered produced.

Shortly after the hearing Caines resigned. SFHA General Counsel Carl Williams assigned the case to Assistant General Counsel Phillip Matsumoto.

C. *Tentative Settlement Agreement*

The parties commenced mediation in March, reaching a tentative settlement on March 31. Per the settlement Walker was to be paid $365,000 in satisfaction of all claims including attorney fees. The settlement was subject to approval by the SFHA Commission (Commission), with a specific provision that settlement would be recommended by General Counsel Williams. As well, SFHA promised to use its best efforts to assure payment within 90 days of execution of the agreement.

Williams, an officer and one of three key administrators for SFHA, signed the agreement for SFHA.

By stipulation and court order, discovery was suspended with reservation of rights until such time as Walker indicated her intent to proceed with litigation.

On June 1, Matsumoto advised Amy Levine, counsel for Walker with Michael Sorgen's firm, that the Commission had met in closed session in May but could not unanimously approve the agreement. He further indicated that the Commission would consider the settlement agreement again at its June 8 meeting. Following that meeting, Matsumoto told Levine that the Commission had questions and was leaning toward approval.

On July 12 Levine wrote to Williams and Matsumoto that litigation would resume if the Commission did not approve the settlement by July 27. Also that month Michael Sorgen contacted Williams. Williams reported that the settlement had not yet been approved, and staff had been instructed to investigate some issues. He promised to provide Sorgen with upcoming agendas and minutes of the Commission. Williams did not keep this promise.

Thereafter, Sorgen informed Williams that the firm would press on with litigation unless the Commission ratified the agreement at the August 24 meeting. Williams said he did not have authority to resubmit the settlement at the August meeting but would present it to the Commission in September.[3] Later he added that the reasons for not calendaring settlement for the August meeting concerned "privileges of attorney-client and work product."

As it turned out, the Commission rejected the tentative settlement for budgetary reasons on the two occasions Williams presented it.

D. *Litigation Resumes*

On August 29 Sorgen notified SFHA that it was resuming litigation and he expected SFHA to comply with the March discovery order by September 14. Williams promised compliance but SFHA failed to honor the deadline. In October Walker moved for issue and evidentiary sanctions or alternatively a terminating sanction, for abuse of the discovery process.

SFHA eventually served discovery responses on November 13. They were inadequate and unverified. Williams signed, explaining that Matsumoto was out of the office and the compliance date was imminent. But Matsumoto had signed his own declaration "in support of compliance with discovery order" *on November 13*.

The sanctions motion was continued several times, once due to Matsumoto's suggestion that no opposition had been filed due to a problem with service. SFHA ultimately filed opposition on December 6. Therein, Matsumoto blamed SFHA's

[3] In fact, Williams had a scheduled trip to China in September.

noncompliance on the agency's takeover by the Department of Housing and Urban Development in 1996.

Following the hearing Commissioner Norris granted Walker's motion for a terminating sanction, ordered SFHA's answer stricken and awarded $30,000 in monetary sanctions for discovery abuse.

E. *Prove-up Hearing*

SFHA objected to the prove-up hearing. The agency argued that default judgment could not be entered against the employer on a theory of respondeat superior while claims were pending against the employee (codefendant Trigueros). Commissioner Norris ruled that SFHA had no standing to appear or present evidence and accordingly did not consider its objections.

Walker sought, and was awarded, a total recovery of $1,611,979.60.

F. *Motion to Set Aside*

SFHA moved to set aside the default and default judgment pursuant to section 473(b),[4] noticing the motion for hearing in the law and motion department. In the tentative ruling Judge Alex Saldamando ordered the motion off calendar, directing SFHA to renotice the motion before Commissioner Norris. At the hearing Judge Saldamando refused to hear SFHA's jurisdictional objection to her.

SFHA petitioned this court for extraordinary relief; we summarily denied the petition. (Case No. A094993.)

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[4] This statute provides in part: "The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment . . . taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. . . . Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any . . . (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect."

At the hearing before Commissioner Norris on the motion to set aside, SFHA again raised the jurisdictional issue. Commissioner Norris indicated that "[t]his is an ongoing proceeding, not a new matter." The court denied SFHA's motion. In addition to Matsumoto's negligence, it found "ample evidence" of negligence on Williams's part, as the representative of SFHA.

II. DISCUSSION

A. *The Court Properly Exercised its Discretion to Impose Terminating Sanctions*[*]

SFHA submits that the court abused its discretion in ordering terminating sanctions. We review the propriety of a discovery sanction under the abuse of discretion standard, overturning only those awards that exceed the bounds of reasons under all the relevant circumstances. (*Foothill Properties v. Lyon/Copley Corona Associates* (1996) 46 Cal.App.4th 1542, 1557.)

To impose sanctions there must be a willful failure to comply with the discovery rules. However, willful failure is not necessarily equated with a " 'wrongful intention to disobey discovery rules. A conscious or intentional failure to act, as distinguished from accidental or involuntary noncompliance, is sufficient to invoke a penalty. [Citation.]' [Citation.]" (*Sauer v. Superior Court* (1987) 195 Cal.App.3d 213, 227-228.) Sanctions for discovery abuses should be appropriate to the dereliction, not exceeding what is required to protect the interests of the party wrongfully denied discovery. Thus, courts may impose sanctions suitable to aiding the discovery quest of the party seeking information, but not to punish the withholder. (*Vallbona v. Springer* (1996) 43 Cal.App.4th 1525, 1545.)

SFHA insists that the terminating sanction here was punitive and excessive. We disagree. First, it is a permitted sanction. (See § 2023, subd. (b)(4).) Second, courts do not have to—and litigants should not have to—tolerate flagrant and persistent abuses of the discovery process. Courts have upheld terminating sanctions as justified in the face of just such behavior. (See *Collisson & Kaplan v. Hartunian*

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[*] See footnote, *ante*, page 1.

(1994) 21 Cal.App.4th 1611, 1617-1620 [no abuse of discretion in striking answer in light of defendant's repeated attempts to thwart plaintiff's legitimate efforts to obtain information]; *Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal.App.3d 481, 486-488, disapproved on other grounds in *Garcia v. McCutchen* (1997) 16 Cal.4th 469, 478, fn. 4 [sanction of dismissal justified where plaintiffs failed to obey court order to provide certain responses, repeatedly failed to verify responses it did provide, repeatedly failed to honor timelines and failed to oppose motion to dismiss].)

In connection with its subsequent motion to set aside, SFHA *conceded* that (1) its discovery responses were inadequate and incomplete notwithstanding the requirements of the court order; (2) requested documents were not timely produced; (3) it served discovery responses without appropriate verifications; (4) oppositions to Walker's motions were not timely filed and when filed, "completely failed to address either the substantive legal issues or factual basis of plaintiff's motion"; and (5) it failed to provide verifications or the privilege log as required. Moreover, SFHA's opposition to Walker's motion for sanctions consisted of little more than self-serving platitudes. It presented no legal argument for why terminating sanctions were inappropriate.

SFHA built a long trail of discovery abuses necessitating three motions to compel and three motions for sanctions. Compliance with discovery orders was not forthcoming. Walker's meet and confer efforts were not fruitful. Deadlines were not honored. Files were produced seven months late after staff repeatedly swore that they were missing. Promises were not met. False statements were made concerning the progress of settlement. As well, by the time the court imposed terminating sanctions, the scheduled trial date was but a month away. At that juncture repeated warnings would have been futile, and it would have been unfair to make Walker push once again for an order to compel what had consistently not been forthcoming in the past.

SFHA also argues that the sanction was excessive because the discovery ordered—and thwarted—only went to the merits of Walker's sexual harassment, discrimination and retaliation causes of action and did not touch on the merits of the remaining causes for defamation, invasion of privacy, assault, trespass or interference with economic advantage. We are not sure of the point of this "argument," but the fact is that discovery did relate to every disputed aspect of Walker's case *against SFHA*.[5] The March discovery order required production of information (1) concerning Walker's return to work and her interactions with union leader Lupe Oropeza and coworkers, which she contended resulted from Trigueros's defamatory statements about her; (2) relevant to discipline of employees who breached confidentiality of the complaint, investigation and remedial actions (in furtherance of Walker's invasion of privacy claim); (3) relating to identity of the witness to the assault; and (4) concerning failure to discipline for the harassment and retaliation (relevant to assault and trespass claims). In short, the discovery abuses affected Walker's ability to prove every one of her claims against SFHA. Striking SFHA's entire answer in the face of this extensive abuse was not unfair.

Next, SFHA revs up its indignation in light of the fact that the ultimate judgment ($1.6 million) was far in excess of the proposed settlement ($365,000). Does SFHA forget that its counsel *misled* Walker about the status of the Commission's response to the settlement offer, and that SFHA ultimately *rejected* the settlement? In any event, by its very nature the settlement was a *compromise* of Walker's claims.

SFHA further maintains that sanctions were excessive because Walker did not request, and the March order did not require, discovery relating to her claims for economic or emotional distress damages. First, the order *did* respond to Walker's

[5] Walker did not seek discovery from SFHA concerning interference with prospective economic advantage because SFHA was not a defendant to that cause of action.

request for discovery concerning economic damages, treating such matters as her time sheets, transfer options, layoffs, and the like. Second, we are puzzled why Walker would go to her employer for information concerning her own emotional distress.

Finally, SFHA complains that contrary to Commissioner Norris's finding,[6] Williams's failure to notify Walker of the Commission's rejection of the settlement cannot constitute discovery abuse. Williams knew the Commission had rejected settlement in June and that SFHA's obligation to comply with the March order was stayed only in anticipation of settlement. There was thus ample evidence to infer that delaying the moment of truth of rejection allowed SFHA to further stall compliance with the discovery order.

SFHA pins its argument on the fact that the section 2023 enumeration of discovery abuses does not include silence in the face of the rejection of a settlement. The listed misuses of the discovery process include, *but are not limited to*, the enumerated offenses. (§ 2023, subd. (a).) Further, the abuse was not mere silence; it was deliberate delay, evasion, misrepresentation and broken promises. Williams's behavior contributed to the very discovery delays and failures constituting disobedience of the March order that compelled the court to impose sanctions. (See § 2023, subd. (a)(7).)

B. *The Damage Award Was Sound*[*]

After entry of a default, "[t]he plaintiff . . . may apply to the court for the relief demanded in the complaint; the court shall hear the evidence offered by the plaintiff, and shall render judgment in his or her favor for such sum . . . as appears by such evidence to be just." (§ 585, subd. (b).) Since a defaulting defendant confesses the

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[6] Although this finding was made after the fact in connection with the order denying SFHA's motion to set aside, it is reasonable to infer that the court did rely in part on Williams's conduct when resolving whether to impose sanctions.

[*] See footnote, *ante*, page 1.

material allegations of the complaint, plaintiff need merely establish a prima facie case for damages. (*Johnson v. Stanhiser* (1999) 72 Cal.App.4th 357, 361.) Our review of the trial court's determination of damages is highly deferential. We will interfere with that determination only where the award is so "disproportionate to the evidence" that it shocks the conscience or suggests that the result stemmed from passion, prejudice or corruption. (*Ibid*.)

1. *Emotional Distress Damages*

SFHA contends that the $500,000 award for emotional distress damages is unconscionable and without evidentiary justification. Walker testified to significant emotional distress due to exposure to vulgar language and verbal abuse on a daily basis; calls at home; isolation from coworkers; harassing contact on the job site and continued calls at home after her foreman was instructed not to contact her; broken promises concerning job assignments; failure of SFHA to take effective action; and bad treatment from coworkers. She was scared, upset, shocked, embarrassed, emotionally exhausted and depressed. She felt degraded, lost confidence and self-esteem, and suffered from feelings of betrayal and self-blame. Walker also testified she was subject to anxiety attacks. Walker's therapist diagnosed her with an adjustment disorder with anxiety and depression. He declared that Walker suffered from depression and anxiety; her sleep was impaired; and she experienced "cognitive impairment due to obsessive rumination concerning problems on the job, . . . and . . . was crying frequently about the harassment she was experiencing."

SFHA complains that Walker's distress was caused almost exclusively by Trigueros, but in fact she also suffered distress as a result of misconduct by SFHA, including failure to investigate; improper response to her complaint; and broken promises. SFHA also argues that much of the prove-up evidence was inadmissible hearsay. The hearsay SFHA complains of concerned the facts and circumstances of the harassment, for example, Walker's testimony that someone splattered paint on her car, and that word about her complaint was out among the coworkers. This

testimony concerns the very allegations in the complaint that SFHA is deemed to have admitted.

2. *Economic Damages*

SFHA argues that Walker was not entitled to any economic damages because she was not constructively discharged. This is not the issue. The allegations against SFHA on 10 theories of liability stated in the complaint were deemed true. Those allegations had to do with SFHA's knowledge of the harassment; failure to take prompt and appropriate corrective action; inadequate supervision of employees; failure to remedy the harassment, discrimination and retaliation; retaliation and intentional discrimination on its own part; failure to ensure confidentiality; and the like. This is the conduct that caused economic damages of the kind that were awarded at the prove-up hearing. It is only the *amount* of damages that SFHA may properly challenge here, and that it has not done.

C. *Plott v. York Does Not Apply*[*]

Citing *Plott v. York* (1939) 33 Cal.App.2d 460 (*Plott*), SFHA insists that default judgment was erroneously entered because the action was still pending against codefendant Trigueros. There, plaintiffs sustained injuries in an automobile collision. They sued the driver/employee and his employer, as to whom the action was predicated solely on a theory of respondeat superior. The driver interjected defenses of unavoidable accident and contributory negligence common to himself and the employer. Default was entered against the employer. After verdict and judgment in favor of the driver, the trial court denied plaintiffs' motion for entry of final judgment of damages against the employer, rendering judgment in its favor instead. The reviewing court affirmed, holding that plaintiff was not entitled to a default judgment against employer where the employee-agent was exonerated at trial. (*Id*. at p. 463.) The court further noted: "Certainly it would not be fair or just to enter a judgment upon default against a defendant who is only secondarily liable, if

[*] See footnote, *ante*, page 1.

liable at all, until there is a successful determination of the suit against a defendant charged with being primarily liable." (*Id*. at p. 464.)

Here, shortly after entry of judgment of default in this case, Walker signed a request for dismissal of defendant Trigueros without prejudice. SFHA argues that because the request for dismissal *postdated* entry of default judgment against SFHA, Trigueros was still a party defendant and the rule of *Plott* compels reversal.

We disagree. Where is the injustice to SFHA? The rule of *Plott* is based on notions of fairness and justice to the defaulting employer. There was and is no pending trial against Trigueros. While the request for dismissal was "without prejudice," SFHA has made no argument, nor put forth any facts, to indicate that the action will, or even can at this point, be reinstated against him.

D. *Jurisdiction to Rule on Section 473 Motion*

Turning to the section 473 proceeding, SFHA first challenges Commissioner Norris's jurisdiction to rule on the motion. There was no lack of jurisdiction.

Our Constitution provides: "On stipulation of the parties litigant the court may order a cause to be tried by a temporary judge who is a member of the State Bar, sworn and empowered to act until final determination of the cause." (Cal. Const., art. VI, § 21.) Under San Francisco's Local Rules of Court,[7] "[a] party is deemed to stipulate that all matters heard in the Discovery Department may be heard and disposed of by a Commissioner, acting as a temporary judge, by failing to file an objection in writing within thirty (30) days after the first pleading is filed in the action by that party . . . ." (Rule 8.14(D).) SFHA answered Walker's complaint and did not file an objection. Therefore, it is deemed to have stipulated to Commissioner Norris's jurisdiction to hear the various discovery matters in this case.

Further, under the rules, "[d]iscovery matters . . . are presided over by commissioners sitting as temporary judges or by any other judicial officer assigned

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[7] Unless otherwise indicated, all references to rules are to the local rules of the San Francisco County Superior Court.

by the Presiding Judge." (Rule 8.14(A)(1).) "Discovery matters" include "all matters arising under or related to the Civil Discovery Act (Code of Civil Procedures, sec. 2016 et. seq.) except civil contempt by a nonparty." (Rule 8.14(A)(1)(a).)

SFHA maintains that a motion to aside the judgment is not a discovery matter under the local rules, and thus the default provisions of rule 8.14(D) do not come into play. Not so. This motion to set aside arose out of the sanctions motion and thus was within the scope of matters "arising under or related to" the Civil Discovery Act. Commissioner Norris had jurisdiction to impose discovery sanctions and thus had jurisdiction to address any motions that directly challenged that order.

SFHA also urges that it should have been permitted to refuse to stipulate to Commissioner Norris's jurisdiction at the section 473 hearing, after she prevented the agency from entering an appearance at the prove-up hearing. The contention lacks merit.

The original stipulation at the commencement of discovery proceedings set the stage for everything to come; no further stipulation was necessary. Appointment of a temporary judge to hear a particular cause carries with it the power to act until final determination of that proceeding. (*McCartney v. Superior Court* (1990) 223 Cal.App.3d 1334, 1338.) The power of a temporary judge to determine any given subsequent proceeding hinges on whether that proceeding is ancillary to, or a direct progeny of, the stipulated cause. Ancillary proceedings are heard and determined on a separate record independent of the ruling in the stipulated cause and thus are not a continuation of that cause. On the other hand, proceedings which question the finality of the temporary judge's ruling or are a part of the stipulated cause are its direct progeny. (*Id*. at pp. 1338-1339; *Reisman v. Shahverdian* (1984) 153 Cal.App.3d 1074, 1095-1096 (*Reisman*).) Such direct progeny include subsequent motions for new trial, to vacate due to mistake, inadvertence, or excusable neglect, or to reconsider the ruling. (*McCartney v. Superior Court*, *supra*, 223 Cal.App.3d at p. 1339; see also *In re Steven A*. (1993) 15 Cal.App.4th 754, 768.) Moreover, the fact

that a section 473 motion might raise a "somewhat different" question from the one considered in the previous hearing does not render it ancillary. Such a motion is a direct continuation of the earlier proceeding, seeks no separate judgment and in fact constitutes a direct attack on the earlier judgment. (*Reisman*, *supra*, 153 Cal.App.3d at pp. 1095-1096.)[8]

Finally, under the rules, motions to set aside are to be heard "by the judge who presided at the . . . proceedings unless that judge is not available." (Rule 8.1(B)(5).) This rule is in keeping with sound judicial policy requiring that section 473 motions be heard by the same judge who rendered the challenged judgment. (*Reisman, supra,* 153 Cal.App.3d at p. 1096, fn. 5.)

SFHA argues nonetheless that *Jovine v. FHP, Inc*. (1998) 64 Cal.App.4th 1506 compels a different result. *Jovine* is inapposite. It pertains to the power of the trial court to make general and special references under sections 638 and 639. Nor does *Reisman* aid appellant. There, the reviewing court determined that the commissioner lacked jurisdiction to hear the section 473 motion because defendant had never been a party litigant until filing that motion and had never stipulated to the commissioner's jurisdiction to do anything. (*Reisman*, *supra*, 153 Cal.App.3d at pp. 1096-1097.) There is no question here about SFHA's status as a party.

E. *Trial Court Properly Denied the Motion to Set Aside*[*]

SFHA's primary complaint is that it was entitled to *mandatory* relief from default under section 473(b) because its attorneys submitted declarations admitting their mistakes. We conclude otherwise.

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[8] SFHA relies on *In re Steven A.* for the proposition that a motion to vacate could be deemed ancillary because it requires the court to evaluate the moving party's excusable neglect. (*In re Steven A.*, *supra,* 15 Cal.App.4th at p. 769, fn. 11.) Although *In re Steven A.* cites *Reisman* for this proposition, as noted above *Reisman* reached the correct, and opposite, result.

[*] See footnote, *ante*, page 1.

1. *Factual Background*

SFHA timely moved for relief from default due to attorney neglect, with a declaration from Matsumoto attesting to his inadvertence and neglect.[9] He declared that although directed to do so, he "did not prepare supplemental responses as requested by plaintiff by September 14, 2000." Further, in connection with plaintiff's motion for terminating sanctions set for October 30, although he was responsible for briefing the opposition, he did not, nor did he prepare or serve supplemental responses in compliance with Commissioner Norris's March order prior to that hearing date. After the hearing and compliance date were continued, Matsumoto directed a paralegal to prepare the supplemental responses but did not closely supervise him or ensure that the responses complied strictly with Commissioner Norris's order, although he assured Williams that the responses were sufficient. He had a heavy workload and also thought that any inadequacies in the responses could be addressed through meet and confer efforts. Moreover, Matsumoto declared he did not prepare an adequate opposing brief and did not submit any declarations or evidence responding to the allegations of discovery abuse. Matsumoto took sole responsibility for the abuses that led to the default and default judgment.

Denying the motion to set aside, Commissioner Norris found that there was "ample evidence of negligence on the part of the client's representative, General Counsel Carl Williams, in addition to the negligence of staff attorney Phillip Matsumoto, in the events resulting in the entry of default and default judgment . . . . The court cites only two examples: Mr. Williams signed the late and entirely inadequate discovery responses that resulted in imposition of the terminating sanction; and, in a truly egregious abuse of the discovery process, Mr. Williams failed to advise plaintiff's counsel that the San Francisco Housing Authority had rejected the proposed settlement on June 8, 2000, although he had been explicitly

[9] Williams also submitted a declaration, but did not admit any fault.

instructed to renegotiate the settlement. This failure resulted in a delay of almost three months in plaintiff's resumption of discovery efforts."

As well, the commissioner *declined* to specially find that discovery abuse "was not caused by" SFHA's attorneys.

2. *Legal Framework*

Under section 473(b), the court "shall" grant relief from default because of mistake, inadvertence, surprise or neglect upon timely submission of an attorney affidavit attesting to the same, "unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect." (*Ibid*.) With this mandatory provision the Legislature has sought to relieve "innocent" clients of the burden of their attorneys' fault, properly lodge the burden on the erring attorneys, and curb the litigation cycle by reducing the prevalence of malpractice suits. (*Benedict v. Danner Press* (2001) 87 Cal.App.4th 923, 927.) Thus, relief under this provision is available whether or not the attorney's neglect is excusable. (*Ibid.)*

We are concerned here with the clause necessitating relief *unless* the court finds that the default "was not in fact caused by" attorney error. This clause tests both credibility and causation. (*Milton v. Perceptual Development Corp*. (1997) 53 Cal.App.4th 861, 867.) On the point of causation, courts have held that an attorney's negligence need not be the only proximate cause of a client's injury so long as there is causation in fact. (*Ibid*.; see *Benedict v. Danner Press, supra*, 87 Cal.App.4th at p. 929.)

In *Benedict v. Danner Press, supra,* 87 Cal.App.4th 923, entry of default was caused by both client and counsel. At issue was the sufficiency of service of process. Bryant Whittaker, a defendant and the authorized agent for service of process for the corporate defendants, inaccurately described the service of process, and this misdescription contributed to the sequence of events resulting in default. (*Id*. at p. 929.) Taking care to point out that the lower court found Whittaker was mistaken but did not lie, the *Benedict* court concluded that section 473(b) did not preclude

mandatory relief where default is entered as a result of attorney *and* client fault. (*Id*. at pp. 929-930.) The court contrasted that situation with discovery abuse cases involving attorney fault and intentional client misconduct, conceding that denial of relief under section 473(b) would be appropriate in such cases. (*Ibid*.)

For example, in *Johnson v. Pratt & Whitney Canada, Inc*. (1994) 28 Cal.App.4th 613, the trial court did not believe the attorney's sworn statement that the discovery fiasco was solely his fault, and indeed found that the client was implicated in discovery misconduct. On this credibility determination and finding the reviewing court affirmed the denial of section 473 relief. (*Id*. at pp. 622-623.)

So, too, in *Lang v. Hochman* (2000) 77 Cal.App.4th 1225, 1251, the trial court denied section 473 relief, specifically finding that counsel and clients had willfully and intentionally violated discovery laws and orders. (*Id*. at p. 1241.) Upholding this result, the *Lang* court held that a party can only rely on section 473(b) where the party is "totally innocent of any wrongdoing and the attorney was the *sole* cause of the default or dismissal." (*Id*. at p. 1248.) The court in *Benedict* disagreed with *Lang* to the extent *Lang* is construed as holding that there is no section 473(b) reprieve where the client's unintentional mistake or error contributes to a default. So do we.

Finally, in *Todd v. Thrifty Corp*. (1995) 34 Cal.App.4th 986, the reviewing court reversed an order vacating a dismissal based on an attorney affidavit. The evidence showed that the attorney error did not actually cause the dismissal and moreover his declaration of fault contradicted an earlier statement attributing the dismissal to the client's personal problems. (*Id*. at pp. 991-992.) In other words, the attorney was " 'covering up for the client.' " (*Id*. at p. 992.)

3. *Analysis*

a. *Matsumoto's Credibility*

The issue of Matsumoto's credibility, specifically his declaration that only he—and not the agency—was at fault, was argued to the court. The court wanted to know whether there was competent evidence that the SFHA rejected the settlement

and plaintiff's attorneys were not notified until months later. Commissioner Norris made it clear that "if that is the case and their right to reopen discovery was not triggered in a timely way because the Housing Authority withheld that information from them, I would consider that [egregious] evidence of discovery abuse that would underl[ie] why I was correct to enter the default and default judgment that I did."

Commissioner Norris ultimately found both the client representative and Matsumoto at fault. Walker argues persuasively that this ruling necessarily encompassed a finding that the court did *not* find credible Matsumoto's sworn statement that he was solely responsible for the default. No other conclusion is possible.

Moreover, Matsumoto's claim to all the blame is inconsistent with his prior sworn testimony that the agency's failure to timely comply with the discovery order was due to the "chaotic nature" of the agency's recordkeeping during and following the time of the federal takeover. This earlier explanation acknowledged SFHA's role in the failure to produce documents. Matsumoto's predecessor attorney, Dennis Caines, similarly pinned responsibility for delay in production of responsive documents on SFHA's human resources department. However, it was not until moving for relief from default that Matsumoto declared that SFHA employees willingly assisted him in providing information for discovery responses when requested.

As well, in order to garner additional time to oppose Walker's sanctions motion, Matsumoto said in court that he was going to attack the motion on the basis of improper service. But his opposition said nothing about the matter of service, and Commissioner Norris struck it at the December 12 hearing. At that time Matsumoto also told the commissioner that SFHA had *fully complied* with all outstanding discovery requests, a statement obviously contradicted by his later sworn declaration of fault.

b. *Matsumoto's Misconduct Did Not Amount to "Positive Misconduct," a Doctrine Predating the Attorney Fault Provisions of Section 473*

Digging back into section 473 cases dating from the 1960's, SFHA argues that it was entitled to relief under the "positive misconduct" doctrine. However, the agency neglects to mention that the "positive misconduct" doctrine developed as an exception to the general rule that attorney negligence is imputed to the client. That doctrine has, for most if not all purposes,[10] been superseded by the attorney fault provisions added to section 473 with the 1988 amendments. (Stats. 1988, ch. 1131, § 1, pp. 3630-3631.)

Moreover, the gist of the "positive misconduct" doctrine is that counsel's dereliction of professional duties has been so flagrant as to constitute attorney abandonment. (See *Buckert v. Briggs* (1971) 15 Cal.App.3d 296, 301 [misconduct of a degree that "obliterates the existence of the attorney-client relationship"]; *Orange Empire Nat. Bank v. Kirk* (1968) 259 Cal.App.2d 347, 353-354 [dereliction of professional obligations so flagrant as to amount to "utter failure to represent" client]; *Daley v. County of Butte* (1964) 227 Cal.App.2d 380, 392 [attorney's neglect so extreme that client "unknowingly deprived of effective representation"].) That just did not happen here. Matsumoto attended hearings and depositions, prepared correspondence, filed briefs and declarations and even submitted discovery responses. His misconduct was not tantamount to client abandonment and the client was not ignorant of the facts or relatively fault-free.

4. *The Agency's Misconduct*

The court cited two incidents of discovery abuse attributable to SFHA's "client representative": Williams's signing off on the late and inadequate discovery responses, and delaying nearly three months in advising plaintiff's counsel that the

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[10] We can, for example, conjure a situation where extreme attorney neglect severely impairs the client's ability to secure cooperation in pursuing the attorney fault remedy.

Commission had rejected the proposed settlement. Although Commissioner Norris referred to ample evidence of "negligence" on the part of SFHA's representative, in fact she called the latter incidence an "egregious abuse of the discovery process." Egregious means "conspicuously bad: FLAGRANT." (Webster's 9th New Collegiate Dict. (1984) p. 398.) In other words, this was not an "innocent" mistake. It was akin to intentional misconduct.[11]

Signing off on Matsumoto's inadequate discovery responses was also more than an innocent mistake. Williams had personal knowledge since at least November 5, 1999, of the pattern of discovery abuse and the possibility of sanctions. Yet, he signed the responses without checking, allegedly trusting Matsumoto's representation of compliance. The responses were deficient on their face.

There was other misconduct as well. Williams claimed "privilege" instead of telling plaintiff's counsel that the Commission rejected settlement; promised to send minutes of Commission meetings, but did not; twice said he planned to introduce the settlement at upcoming meetings, and did not; and personally promised to produce discovery, and did not.

5. *Williams Was the "Client Representative" for Purposes of Section 473*

The court found that Williams was the "client's representative" for SFHA. Under rule 4.3(F) and the city's early settlement program policies and procedures, the attendance of a "part[y]" is required at settlement conferences. Williams, an officer of SFHA, one of the agency's top three administrators and its former executive director, served as the client representative with authority to tentatively settle for the party. At the request of plaintiff's counsel, a signature line was added to the tentative settlement agreement for his signature, and Williams did in fact execute it. Matsumoto indeed told counsel for Walker that Williams "authorized"

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11 The discovery order in effect was stayed pending settlement. After the Commission rejected settlement, SFHA could no longer rely on the litigation stay. By repeatedly obfuscating the issue of settlement, Williams was able to forestall complying with the discovery order and delay Walker's prosecution of the case.

the settlement. As well, he declared that the tentative agreement "was executed by all parties on April 14, 2000."

From the record it is clear that Williams is the only person who ever functioned as the "client" for purposes of mediation and settlement.

SFHA asserts nonetheless that the court erred in concluding Williams was the client representative because only the Commission can exercise the agency's "sovereign powers" such as approving a settlement over a certain amount. Moreover, it argues, the settlement agreement assigned SFHA's "General Counsel" the responsibility of procuring Commission approval. How can he, asks SFHA, be both general counsel and client?

We have no quarrel with the proposition that the sovereign powers of a housing authority are lodged with the commission, not the officers or employees. (*Holtzendorff v. Housing Authority* (1967) 250 Cal.App.2d 596, 619.) However, SFHA's position is not sustainable. The ability to exercise sovereign power is not the only indicia of whether one is a "party" or a "client representative" of a party. Decisions to comply or disregard discovery demands and orders do not stem from a government agency's sovereign powers; they are the product of executive action and administrative decision-making. Officers making such decisions are acting for the agency and when they do, they are "client representatives" of the agency as party.[12]

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[12] In its reply brief, SFHA cites the Rules of Professional Conduct to shore up its argument that Williams was not the client representative. Rule 3-600(A) of the Rules of Professional Conduct states: "In representing an organization, a member shall conform his or her representation to the concept that the client is the organization itself, *acting through* its highest authorized officer, employee, body, or constituent overseeing the particular engagement." (Italics added.) Although Williams wore the hat of general counsel, he was also the highest officer and employee through which SFHA operated for purposes of the Walker engagement. *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1093 does not change this result. There, our state's high court held that a corporation is entitled to recover contractual attorney fees for efforts of its in-house counsel. In-house counsel, like private counsel, stands in an attorney-client relationship with the company and the corporation represented by in-house counsel is in an agency

Williams simultaneously held himself out as "client" when dealing with the settlement and as "attorney" when, for example, he signed pleadings for Matsumoto. The court appropriately rejected his attempt to shield aspects of his conduct from attribution to the SFHA for purposes of discerning whether the party's "client representative" had any responsibility for the default.

III. DISPOSITION

The default judgment and the order denying SFHA's motion to set aside the default judgment are affirmed.

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Reardon, J.

We concur:

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Kay, P.J.

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Rivera, J.

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relationship. (*Id*. at pp. 1093-1094.) *PLCM* has no bearing on whether in-house counsel can also don the hat of "client representative" for purposes of section 473.

A095476

Trial Court:	San Francisco County Superior Court
Trial Judge:	Hon. Loretta M. Norris
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